NO. 88-1061

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

BEN HAMMOND. . . . . .PETITIONER,

vs.

ABURN UNIVERSITY,
et. al. . . . . .RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Even assuming no material facts in dispute, should a Summary Judgment have been granted in a case with no United States Supreme Court precedent when there exists overwhelming probative evidence and inferences to be drawn in favor of the petitioner which according to rulings by this Court and the Eleventh Circuit Court of Appeals should have prevented the Summary Judgment from being granted?

II. Should a Summary Judgment have been granted in an academic case without precedent in which the factual description of the academic norm of catalog-of-entry graduation is shown to be a standard for proving that the respondents deprived the petitioner of his constitutional rights of due process, contract, equal protection and freedom from ex post facto state laws?

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LIST OF PARTIES

The following is a list of all parties involved in this proceeding and their respective counsel.

The petitioner, pro se, is Ben Hammond, represented by counsel in District Court by

Mr. Stephen Nesmith
P.O. Box 1047
Montgomery, AL 36102

The respondents are Auburn University; James E. Martin; George H. Emert; Warren Brandt; J. David Irwin; Lynn Weaver; R. C. Bamburg; Emory Cunningham; John Denson; Bessie Mae Holloway; Robert E. Lowder; Michael McCartney; Morris Savage; Henry B. Steagall, II; James Tatum, Jr.

(Mr. Bill Nichols, originally named as respondent, is deceased. At time of this filing the petitioner is not aware of a successor being named.)

Counsel for the respondents is

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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BEN HAMMOND, PETITIONER,

vs.

AUBURN UNIVERSITY, et al., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Ben Hammond, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in affirming, without opinion, the Judgment and Order of the United States District Court for the Middle District, Eastern Division of Alabama.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eleventh Circuit denying petitioner's petition for rehearing and suggestion of rehearing en banc rendered is unpublished. A copy thereof may be found in Appendix "A".

The Judgment of the United States Court of Appeals for the Eleventh Circuit rendered August 25, 1988 affirming, without opinion, the District Court decision is unpublished. A copy thereof may be found in Appendix "B".

The Judgment and Memorandum Opinion of the United States District Court for the Middle District, Eastern Division of Alabama granting the Summary Judgment is included in Appendix "C".

This decision of the District Court is published at 669 F. Supp. 1555.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 25, 1988. Petitioner timely filed a Petition for Rehearing en banc with the Court of Appeals. The petition was denied on September 30, 1988.

This Petition for Writ of Certiorari was filed within ninety (90) days of the denial of Petition for Rehearing and Suggestion of Rehearing en Banc by the Court of Appeals. Jurisdiction is properly invoked pursuant to Title 28, United States Code, Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Constitution of the United States of America provides in pertinent parts:

> No state shall pass any ...expost facto law or law impairing the obligation of contracts.

The Fifth Amendment to the Constitution of the United States provides in pertinent parts:

> No person shall be...deprived of...property, without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law...

Section 1983 of Title 42 of the United States Code provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Rule 56(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. p. 56(c), provides in pertinent part:

> Motion and Proceedings Thereon...the [summary] judgment sought shall be rendered forthwith of the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This Court has the unique opportunity to address the Constitutional implications of an educational case without precedent and, arguably, addressing the most fundamental issue of a state university student's Constitutional rights: the reasonable expectation of obtaining the property of a degree having objectively met the graduation requirements, especially when overwhelming disputed and undisputed probative evidence clearly shows a horrendous violation of the academic norm by the educators involved. Previously, the United States Supreme Court has only addressed educational cases in which subjective faculty discretion was used in making

judgments and recommendations on students and the student had not completed the stated requirements. No case has ever been decided by this Court in which these subjective faculty judgments, after having been converted to irrefutable objectively awarded grades, statistically accumulated, resulted in the indisputable certainty of the student achieving the originally stated objective graduation requirements, yet the student was denied the degree.

The instant case is precedential in a number of other significant landmark Constitutional aspects of academic litigation. Never has the academic norm been so clearly and succinctly defined, then shown to be paradoxically violated and adhered to by the same respondents.

Never has this Court addressed the Constitutional rights of a student to an educational state contract and a student's freedom from unconscionable terms therein. And, never has the Constitutional right of freedom from ex post facto laws been applied in an educational setting.

II. STATEMENT OF RELEVANT FACTS

The petitioner entered the Auburn University ("Auburn") School of Engineering in the Summer Quarter of 1982, after attending Auburn University at Montgomery ("AUM"). Both Auburn and AUM are public universities supported by the State of Alabama. AUM is the only other university governed by the respondent Board of Trustees.

At Auburn University the petitioner experienced difficulty with the course

work, as have thousands of other previous engineering and non-engineering graduates of Auburn University. This difficulty was illustrated by the petitioner being placed on academic suspension for two (2) quarters and then being allowed to return to school in the Summer Quarter 1984. Except for this two (2) month period the petitioner was continually enrolled at Auburn University from entrance until one quarter after dismissal from the School of Engineering. (See below) No evidence has been presented by the respondents that any degree of difficulty with course work has ever previously been used as a reason to deny a student a degree he has rightfully earned by meeting the stated graduation requirements.

Concurrent with the petitioner's return to classes, Summer Quarter 1984, the School of Engineering, only, announced graduation requirement and academic probation/suspension changes. The graduation changes were to become effective with all engineering students graduating Summer Quarter 1985 and later, (R-Exh-Env. 1-Hammond depo-Def. Exhibit 3.) The academic probation/suspension changes were effective immediately. The petitioner was aware of all these changes.

With the completion of courses in the Summer Quarter 1985, and while awaiting Fall Quarter 1985, classwork that the petitioner had already been accepted for, the petitioner contends as a disputed material fact that he was seven (7) hours short of graduation

according to the catalog-of-entry. Through successful completion of course work since the Summer Quarter 1984 suspension the petitioner was under no academic warning nor suspension at all, original or new, having never been given an oral nor written notification of any academic restrictions.

On September 10, 1985, between Summer and Fall Quarters 1985, the petitioner received a letter from Dr. J. David Irwin, head of the Department of Electrical Engineering barring the petitioner from taking further courses in the electrical engineering department and, in effect, from taking further courses in the School of Engineering. (R-Exh-Env. 1-Irwin depo-petitioner Exhibit 1, "Irwin leter".) The petitioner immediately appealed to be

allowed to continue. These appeals were denied.

During the next three (3) quarters the petitioner made continual written and oral appeals to the respondents including a request in writing, certified mail, return receipt, received by all of the respondent Board of Trustee members and orally presented to two (2) of them. (R-Exh-Envelope 1-Hammond depo-pp. 30-34.) (This is erroneously reported by the District Court at R1-47-11.) During this three (3) quarter period after the "Irwin letter" the petitioner also took one course at Auburn University, not in the School of Engineering; one course at AUM, and one course at Tuskegee University. (R-41-Exh) With the completion of those courses he contends,

as a disputed material fact, that he satisfactorily completed the catalog of entry graduation requirements, only prevented from fulfilling every jot and title of the respondents' administrative requirements by the respondents' own contended illegal actions.

Upon completion of these courses he asked to be allowed to graduate. The response was by respondent President of Auburn University, James Martin. In the "Martin letter" of April 29, 1986 (R-Exh-Env. 1-Martin depo-Plain. Exhibit 2), President Martin homogenizes quotations from both catalogs, finally stating "It would appear to me that, since our faculty make recommendations concerning the awarding of degrees, you have not met the requirements of the Bulletin of 1981-82--which you must to

maintain is a contract." According to respondent President Martin the only requirement remaining is "faculty recommendation" relative to the 1981-82 Bulletin.

In addition to the above "Martin letter" excerpt, the following are statements by the respondents regarding why the petitioner was not allowed to graduate. In a statement of August 24, 1987 the respondents say:

> Because of this [disclaimer] at the time the decision [to bar Mr. Hammond] was made by the Electrical Engineering faculty [Mr. Hammond] was not subject to the graduation requirements in the 81-82 Bulletin. Rather, Mr. Hammond was subject to the graduation requirements contained in the 85-86 Bulletin, (R1-37-29, similar at p. 35 and 44).

In a later brief the following contradictory quote is found:

> [Mr. Hammond] also contends that the letter received from [Dr.] Irwin stated that [Mr. Hammond] was not making satisfactory progress towards a degree in electrical engineering <u>because the graduation requirements for that degree had changed in the Summer Quarter of 1985</u>. [Auburn administrators' emphasis.] <u>This is totally incorrect</u>. [Mr. Hammond's emphasis] [according to the Irwin letter]...[Mr. Hammond] was not making satisfactory progress toward a degree in electrical engineering based upon a careful review of [Mr. Hammond's] record and academic progress. (R1-46-2)

The following statements are found in the Auburn University catalogs:

1. A "disclaimer" similar to this one found on page one of the Auburn University <u>81-82 Bulletin</u>, the catalog-of-entry.

> The University reserves the right to make changes as required in course offerings, curricula, academic policies and other rules and regulations affecting students to be effective whenever determined by the University. These changes will govern current and formerly enrolled students. Enrollment of all

students is subject to these conditions. (R1-41-Exhibits)

(Note: A similar statement is also found in the respondent AUM catalog that does allow catalog of entry graduation.)

2. A statement under Curriculum Model Change..."In no case, however, will the changed curriculum compel a student to accumulate additional hours and grade points in order to graduate" p. 25 81-82 Bulletin (R1-41-Exhibits).

3. A "residency requirement" of Forty-five hours must be earned in residence in order to receive a bachelor's degree. As a general rule the 45 hours must be taken in the final year and in the school or curriculum of graduation. The student's dean may waive the final year's residence, and, may also allow course credit to be earned at another institution during the final year. (Emphasis mine) 81-82 Bulletin, p. 32.

4. "Academic Probation and Suspension of Undergraduates"

> Auburn University may place an undergraduate student on probation of suspension at any time if he...makes unsatisfactory progress

towards graduation. (p. 29, 81-82 Bulletin)

The following additional evidence was brought forth during the discovery period.

1. An affidavit of the petitioner proves that virtually every other college and university in Alabama, including the only other university governed by the respondent Board of Trustees, AUM, allows catalog of entry graduation and no college or university has ever been shown to allow retroactive graduation changes. (Petitioner's affidavit of August 31, 1987)

2. The Dean of the Auburn University School of Education will allow catalog of entry graduation if proposed changes are made in the School of Education curriculum. (R-Exhs-Env. 2-Blackburn depo-pp. 18-19, 30)

3. The "unsatisfactory progress" rule had never before been used to dismiss a student from the School of Engineering. (p. 9 appeal, R-Exhs-Env. 1-Irwin depo-pp. 40-41)

4. The term "faculty recommendation" is only used in the graduation ritual. Any student who meets the graduation requirements is given automatic "faculty recommendation." (R-Exhs-Env. 1-Martin depo-pp. 9, 10)

III. PROCEEDINGS BELOW

On October 22, 1986 the petitioner filed the Complaint against the respondents in District Court, Middle District of Alabama, Eastern Division. (R1-1) The petitioner alleged a violation of his due process rights, a

violation of his equal protection rights, breach of contract and conspiracy. He sought permanent injunctive relief and punitive and compensatory damages. He subsequently filed two amended complaints. (R1-16 and R1-20)

Since the Complaint was entered various hearings and motions have been filed. As a result of the Court's rulings, Auburn University has been dismissed as a party to this action (R1-15) and Mr. Hammond's allegation of conspiracy has been struck from the Complaint. Mr. Hammond has remaining three Counts against the Auburn administrators, and requests for injunctive relief and damages.

The Auburn administrators filed two (2) separate motions seeking a Summary

Judgment (R1-29 and R1-35). The Lower Court granted the Summary Judgment on September 24, 1987. (R1-47) On October 16, 1987 Mr. Hammond, pro se appealed to the Eleventh Circuit Court of Appeals. (R1-49) On August 25, 1988 the Eleventh Circuit affirmed the Lower Court decision, without opinion. A Petition for Rehearing and Suggestion of Rehearing en Banc was denied on September 30, 1988.

REASONS FOR GRANTING PETITIONERS'* WRIT OF CERTIORARI

I. Even assuming no material facts in dispute, a Summary Judgment has been granted in a case with no United States Supreme Court precedent when there exits overwhelming probative evidence and inferences to be drawn in favor of the petitioner which according to rulings by

*Petitioner will primarily cite the District Court since no opinion was offered by the Appeals Court.

this Court and the Eleventh Circuit Court of Appeals should have prevented the Summary Judgment from being granted.

The United States Supreme Court and the Eleventh/Fifth Circuit Court of Appeals have explained, in both specifics and spirit, the guidelines for granting a Summary Judgment. Following are excerpts of rulings cited by the District Court. "The Court's sole function is to determine whether there exists issues of material fact to be tried and, if not, whether the moving party is entitled to a judgment as a matter of law." Dominick v. Dixie Nat. Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987), other citations omitted.

> [1] ...the judge must ask himself...whether a fair· minded jury could return a verdict for the [petitioner] on the evidence presented...whether reasonable jurors could find by a

> preponderance of the evidence that the [petitioner] is entitled to a verdict.
>
> [2] ...Credibility determinations, the weighing of the evidence, the drawing of legitimate inferences from the facts are jury functions, not those of a judge...
>
> [3] ...the evidence of the [petitioner] is to be believed, and all justifiable inferences are to be drawn in his favor...
>
> [4] ...the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 214-216 (1986), other citations omitted.

The position of the United States Supreme Court has been further clarified by rulings not cited by the lower courts. The important question concerning granting a Summary Judgment is "whether the evidence presents a sufficient disagreement to require

submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Bill Johnson's Restaurants, Inc. v. NLRB, 103 S.Ct. 2161, 2171, n. 11.

Further clarifications have come from rulings of the Eleventh (and Fifth) Circuit itself. The District Court must not "assess...the probative value of any evidence presented to it, for this would be an unwarranted extension of the Summary Judgment device." Gauck v. Meleski, 346 F.2d 433, 436 (5th Circuit, 1965). It is the province of the jury to assess the probative value of the evidence. Odom v. Celotex Corp., 764 F.2d 1486 (11th Circuit 1985).

"Even when the parties agree on the basic facts, Summary Judgment is inappropriate if reasonable minds might differ on the inferences to be drawn

from those facts." Warrior Tombigbee Transportation Co. v. M/V Nan Fung., 695 F.2d 1294, 1296 (11th Circuit 1983). Similar at Clemons v. Dougherty County, Georgia, 684 F.2d 1365, 1369.

In Boeing Company v. Shipman, 411 F.2d 365, 374 (1969), the governing ruling of the Fifth Circuit Court of Appeals further clarified the burden of doubt.

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper...[but] if there is substantial evidence opposed to the motions, that is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

The petitioner has conceded that there were no genuine issues of material

facts although some have been misstated by the District Court, such as the petitioner not personally contacting the respondent Board of Trustees. (See Statement of Relevant Facts) For the most part, the facts of the instant case are the bulletins, objective grades, written administrative decisions, rulings and correspondence. However, the petitioner does contend that the inferences to be drawn from thee facts, with the primary inference being that he has completed the graduation requirements originally set forth by the respondents, is disputed. By using the non-disputed facts to draw this inference the petitioner contends that the "fair-minded" could readily rule in his favor and reasonable men could reach a differing opinion from that reached by the District Court.

The jury would hear voluminous amounts of evidence proving the petitioner's case far in excess of the minimum required to deny the Summary Judgment. It would hear of the disclaimer being unequivocally limited in scope and severity, both specifically and in intent, by the respondents themselves through the Curriculum Model Change statement..."In no case, however, will the changed curriculum compel a student to accumulate additional hours and grade points in order to graduate." (81-82 Bulletin, p. 25) "No case" means precisely that "no case," NEVER will a student have to accumulate additional hours and grade points to graduate because of a change made by the respondents. The interpretation and

inferences to be drawn from that statement, and all others, according to the above rulings, are not to be made by the respondents, nor the petitioner, nor so misguidedly by the District Court that it even disregards the statement completely in the Memorandum Opinion, but by the jury which has that legal obligation of decision. The District Court showed callous misjudgment in ignoring the statement, and at the least, drawing inferences damaging to the petitioner.

At the very least, the inferences to be drawn in the light most favorable to the petitioner of the respondents wishing to protect students and, thus the petitioner, from retroactive graduation requirements would be readily apparent to a jury that could rule the

respondents were breaking their own rules and spirit of those rules by not allowing catalog of entry graduation.

The jury would hear of virtually every other college and university in Alabama making written and precise allowance for letting a student graduate under the catalog of entry. (Petitioner affidavit of August 31, 1987) It would appear to the jury based on this disputed, thought to be believed evidence, the academic norm was clearly to allow catalog of entry graduation and the respondents were specifically and substantially violating the norm. The jury would learn that every student at the only other university governed by the respondent Board of Trustees, Auburn University at Montgomery (AUM), is allowed to graduate under the catalog of

entry even though the AUM catalog also contains a "disclaimer" similar to the one of the main campus. The respondent Board of Trustee members arbitrarily and capriciously allow catalog of entry at one entire university and disallow it at one school of the only other university under their control. A jury could have differing opinions and not deem the facts "irrelevant" as did the District Court. (R1-47-18)

The jury would hear that the Dean of the Auburn University School of Education, who should be expert in such educational matters, allows students in a changed educational curriculum of the School of Education the right to graduate under the catalog of entry.

The jury would learn the petitioner's own reasons why they did

not allow the petitioner to graduate in correspondence from the respondent Auburn University President James Martin and other sources. ("Martin letter") By "viewing the evidence in the light most favorable to the petitioner," the jury could readily find that the "faculty recommendation" is a mere malicious, arbitrary and capricious contrivance by the respondents to deny the petitioner his rightfully earned degree.

The jury would make inferences and draw conclusions from the "lack of sufficient progress" rule never before being used on a student in the School of Engineering or the entire university according to the respondents' questioned. The jury would hear that the petitioner was under no academic

restriction when dismissed nor was he even given a simple oral or written warning of the impending dismissal.

Even with no material evidence in dispute, it is inconceivable to the petitioner how a fair-minded District Court and Eleventh Circuit Court of Appeals Lower Court, by using the United States Supreme Court and Eleventh (and Fifth) Circuit Court of Appeals rulings could be so oblivious to the temperament of a jury so as to allow the Summary Judgment to be granted. Given the highly persuasive probative evidence of retroactive graduation requirements being enforced nowhere else, not even by the respondents themselves, the drawing of possible inferences favorable to the petitioner and, at the very least, a dispute of an issue of whether or not

the petitioner did actually meet the original graduation requirements that could lead to a verdict for the petitioner, the lower courts grossly erred in granting and affirming the Summary Judgment.

In a typical granting of a Summary Judgment the probative evidence would be overwhelmingly so in favor of the movants that the Summary Judgment should be granted. The evidence presented would logically concur with the decision to be reached by the hypothetical fair minded jury. Such as in this Court's ruling in Bill Johnson's Restaurants, Inc. v. NLRB at 2171, n. 11, the choice is so one sided that what remains is a matter of law. If there is disagreement over what a jury could rule, then it is for the jury.

However, the instant case is extraordinary in that even though there is no significant disputed material evidence, as has been shown, this does not solely justify the granting of the Summary Judgment where the inferences to be drawn and conclusions that the jury could reach are so one-sidedly in favor of the non-movant, the petitioner. This is true when granting the Summary Judgment deprives the jury the opportunity to exercise it's rightful obligations and opportunity for awarding a verdict to the petitioner.

In granting the Summary Judgment, the District Court, dutifully quoted the rulings of the courts regarding Summary

Judgments but completely ignored all of them, or at the least, grossly, callously and illegally, interpreted them so much in favor of the respondents as to avoid a necessary jury trial. The petitioner contends it was as if the District Court recognized and applied the basic Federal Rules of Civil Procedure quote regarding Summary Judgment, had a rote, pre-prepared segment of Summary Judgment rulings inserted and then proceeded to totally ignore the rulings.

If the District Court did not ignore the rulings, but applied them, the petitioner contends that this application represents a callous and malicious interpretation by the District Court of the facts in light of the Summary Judgment rulings and a

usurpation of the jury obligations granted by the above rulings for not granting a Summary Judgment.

The petitioner contends that this Court has presented before it an intriguing legal paradox, perhaps, without precedent, and certainly without precedent in academic litigation: a case fulfilling one criteria for granting a Summary Judgment, no dispute of material fact, yet clearly and indisputably fulfilling the criteria for not granting a Summary Judgment where the inferences drawn and conclusions reached by a fair minded jury could readily and unmistakably lead to a verdict for the petitioner.

The decision reached by the District Court was wrong and should be overturned by this Court, with the

proceedings returned to the District Court for trial by that "fair-minded" jury to determine the verdict and awarding of damages based on the specific facts presented.

II. A Summary Judgment should not have been granted in an academic case without precedent in which the factual description of the academic norm of catalog-of-entry graduation is shown to be a standard for proving that the respondents deprived the petitioner of his constitutional rights of due process, contract, equal protection and freedom from ex post facto state laws.

This Court has held that the Court may override an academic decision if

> it is such a substantial departure from accepted norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Regents of University of Michigan v. Ewing, 106 S.Ct. 507 at 513.

By subjecting the petitioner to the new graduation requirements, the respondents were acting so contrary to

accepted 'norms' and sound, informed "professional judgment" their actions were an academic anomaly. Nowhere except specifically in the Auburn University School of Engineering, not even anywhere else on the Auburn campus or in the whole of the Auburn University system itself governed by the respondent Board of Trustees, have retroactive graduation requirements been shown to be allowed. (R1-41-Plaintiff affidavit, R-Exh-Env. 2-Blackburn depo-pp. 18-19; 30) Nowhere else in the entire State of Alabama have retroactive graduation requirements been shown to be allowed with virtually every college and university in the State of Alabama allowing the right to the students.

Constitutionally Protected Property Rights

To claim a substantive due process violation there must be a constitutionally protected property interest. These property interests are not created by the Constitution but are created and defined by existing rules or understandings that stem from external sources such as state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 92 S.Ct. 2701, 2709 (1972)[1]

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1 The right of physical property ownership and contract rights are also shown to be grounded in and under the color of State of Alabama law with the petitioner challenging the "reasonable rendering of the state law" interpretation by the Lower Courts. (Ewing at 512-513. See footnote 9 at 512 and footnote 10 at 513.)

> To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it...a reliance that must not be arbitrarily undermined. Roth 408 U.S. at 577, 92 S.Ct. at 2709 (1972)

The petitioner has more than an abstract need or desire for a degree to gain employment and enjoy all its benefits and rewards. He also has more than a 'unilateral' expectation of it with the same 'reasonable expectations' and 'legitimate claim of entitlement' for obtaining the degree based upon meeting the graduation requirements as have thousands of Auburn students and

all other students of the State of Alabama.

First, the petitioner embraces the arquendo property right to "continued enrollment" granted by the United States Supreme Court in Ewing and cited by the District Court (R1-47-14) as sufficient justification for a due process property claim.

Secondly, the petitioner claims the far stronger property right of having objectively earned the degree. Unlike Mr. Ewing, Ms. Horowitz, et al., the petitioner claims to have rightfully earned the degree, immune from any further judging by the respondents. This claim is also based in State of Alabama law.[2]

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2 The term 'property' is applicable to the exclusive right of the owner with

respect to the use, control and disposition of something which is capable of ownership, but in its more general and popular sense it is applicable to the thing...and is applicable to incomes Eliasberg Brothers Mercantile Co. v. Grimes, 86 So. 56, 204 Ala. 492, 11 A.L.R. 300. The petitioner contends an academic degree has exclusive right of the owner with respect to use and control and it is a 'thing' with the document representing the advantages and use flowing from it. Alabama law assumes a property right even more nebulous than the petitioner's claim. The right to be eligible to participate in college athletics cannot be viewed as a mere speculative interest but is a property right of present economic value. Gulf South Conference v. Boyd, 369 So.2d. 533. An engineering degree has as much or more "present economic value which should not be taken away without urgent reason." Smith v. Smith, 48 So.2d 546, 254 Ala. 404. The respondents had no urgent reason whatsoever to withhold the degree from the petitioner.

Thirdly, the respondents violated the petitioner's constitutional contractual property interest. The District Court ruled arguendo that some form of educational contract existed.

(R1-47-15) "[E]xtending rules or understandings" need not be...an explicit contractual provision, citing implied contracts as sufficient to constitute a protected property interest." Vail v. Board of Education Union School District No., 95, 706 F.2d. 1453 (1983) affirmed 104 S.Ct. 2144 at 1437 citing Perry v. Sinderman, 408 U.S. 593 at; 601, 92 S.Ct. 2694, at 2699 (1972). The petitioner claims he has met the terms of the "contract" and expects the degree.

The Lower Courts also incorrectly interpreted Alabama contract law which clearly shows a violation by the respondents in the spirit and letter of the contract law. (Let this Court be aware that the petitioner is aware that the student/educator relationship is not

and can never be a purely contractual relationship, yet the contractual model of interaction and trust must be generally obeyed.)[3]

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3 "Once it appears that a contract is ambiguous, [the] court will construe it more strongly against the party who prepared it [the respondents]" Weathers v. Weathers, 508 So.2d. 272. Uncertainty of terms the courts will strike down, Hamilton v. Stone, 202 Ala. 468, 80 So. 852. The "disclaimer" generalities of unlimited academic discretion for the respondents are the epitome of ambiguity and uncertainty. The respondents furnish only one very imprecise, arbitrary and capricious definition for 'unsatisfactory progress'. (R-Exh-Env. 1-Irwin depo, pp. 12, 52) 'Faculty recommendation,' is not only a purely oral supposed aspect of the contract, but defined in deposition only, after the start of litigation as one who has met the graduation requirements and had this verified by the dean or registrar.

The fundamental determination in legal construction of contracts is the real intention of parties. Parr v. Godwin, 463 So.2d. 129 Ala. 1984. Under Alabama law, in construing a contract regard must be given not only to the nature of the instrument but also the condition of the parties and to the objects they had in view. Owens v.

American Surgical Co., 217 F.2d. 334 at 337 (5th Circuit, Alabama) The petitioner had the reasonable expectation of achieving a degree based upon meeting the original standards.

A contract though not enforceable at it's inception because of lack of consideration and mutuality may nevertheless become valid and binding to the extent that it has been performed. Howard v. Mercury Rec. Co., 178 F.2d. 449 (5th Circuit, 1949 Alabama) Test of mutuality of contract is not to be applied as of time when promises are made, but more properly as of time when one or other of the promises is sought to be enforced. Hill v. Rice, 67 So.2d. 789, 259 Ala. 587. A contract valid in its inception is not rendered illegal by what a party does in performing it. Bush v. Russell, 61 So. 373, 180 Ala. 590. The petitioner is seeking his degree after fulfilling the contract and according to Alabama law this fulfillment of the contract makes it binding, no matter how he did it.

Legitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the Due Process Clause and the civil rights statutes. Sinderman, 408 U.S. at 602, 92 S.Ct. at 2700. With

regard to actions taken under the color or state law and not under the authority of state law, the United States Supreme Court has stated

> Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560.

Arbitrary and Capricious

The petitioner contends that for the respondents to choose the School of Engineering for a retroactive change of graduation requirements is arbitrary and capricious in the light of the evidence presented. Based on the "entirety" of [the petitioner's] academic career as meager as it may be, relative to the original graduation requirements, the

actions were also arbitrary and capricious. (See Ewing at 513)

The petitioner contends he is perhaps the only student in Auburn University history to be denied a degree because of a lack of formal "faculty recommendation." Depositions have shown that this statement is never written, used only in the graduation ritual, never been known to be used against a student to deny a degree, and automatically awarded upon the student meeting the graduation requirements. A jury could readily decide that this is a malicious act by the respondents to fabricate a justification for not allowing the petitioner to graduate.

The respondents are simply deceiving the Court by hiding in the legalistic garb of omnipotent academic freedom by requiring "faculty recommendation." The petitioner prays that the Court is not so blind as to be so deceived.

The respondents have also noted that a faculty committee met to decide if the petitioner should be dismissed from the school to avoid the arbitrary and capricious claim. The petitioner contends that this decision was predicated on what the faculty members considered to be an inviolable academic premise that the petitioner was to be judged under the new graduation requirements and if not, they were dismissing the petitioner one quarter from graduation. They had ample

opportunity to reprimand the petitioner well before he had only seven (7) hours before graduation or put him on some sort of academic warning which he was not on. The petitioner contends that between quarters, after pre-registration, after the change of the graduation requirement announcement and in the quarter of graduation is a very arbitrary and capricious time for the committee to pick to dismiss the petitioner from school.

Contractual Violations

Under the diversity jurisdiction of the United States Supreme Court the petitioner claims specific contractual violations of the actual catalog and the unprecedented claim of "unconscionable" terms enforced by the respondents.

The Curriculum Model Change statements specifically prevents the respondents from making retroactive graduation changes more stringent than the original requirements. (See "Statement of Relevant Facts") The respondents argue that it does not apply to the situation. (R-Exh-Env. 1-Irwin depo pp. 30-32; R-Exh-Env. 1-Brandt depo-pp. 14-17) It is very conveniently self-serving for them to claim everything in the catalog supports their position, yet since they 'wrote' the catalog/contract it "...is to be most strictly construed against the party who prepared it." Minge v. Green, 58 So. 381, 176 Ala. 343 other citations omitted.

Even assuming it did not apply, clearly the reason the respondents

placed these statements in all the Auburn University catalogs was to protect the students from necessary University enforced changes in their course work that could prevent them from ever graduating. There is no justifiable reason why the respondents should make such an unconditional statement of protecting all students from curriculum changes yet brazenly change the graduation requirements and violate their own dictum for one school of students in one university.

The petitioner also makes the precedent setting claim that the "disclaimer" is legally and educationally "unconscionable" when it is used to force the petitioner to be subject to the new graduation requirements, given the legal backdrop

of the blatant violation (and fulfillment) of the academic norm. A description of "unconscionable" is

> ...Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party...such as no sensible man not under delusion, duress, or in distress would make, and such as no honest and fair man would accept." (Case citations omitted) Black's Law Dictionary

In the instant case all the criteria of unconscionability are met: one sidedness, absence of meaningful choice by the petitioner, terms unreasonably favorable to the respondents, and procedural advantages over a particularly susceptible clientele. If this were a 'run of the mill civil case' (R1-47-9) there would be no doubt whatsoever that the respondents would be guilty of enforcing

an unconscionable contract. But because of its distinguishing factor of academics this Court must balance this educational responsibility with the petitioner's rights, free from educational and legal unconscionability, based on the specific facts of this case.

Alabama law as voiced by the Alabama Supreme Court ruled regarding unconscionability is quite succinct.

> It is very true that the parties are all sui juris, and are therefore bound by their contract; and if they have made for themselves a hard one, they should be required to live up to it. But to hold parties to a contract, almost, if not quite, unconscionable, the language used, and acts done under and in connection with it, must be clear and definite and not uncertain. If susceptible of two constructions, one of which will prevent such ruinous results to the paraties, that construction should be adopted rather that the one which would award 'the pound of flesh'.

Patterson v. Atlantic Coast Line, 81 So. 85 at 94. The petitioner expected, received, and fulfilled a very "hard" contract.

All the other educators of the colleges and universities in the State of Alabama, private and public, including even all of the Auburn University system except the School of Engineering, do not abandon their academic freedom to change and improvement nor forfeit their legal right of the "widest academic latitude" for making proper educational decisions. They proceeded maturely and equitably, satisfying both their needs for academic freedom and preserving and protecting the students' Constitutional and contractual rights to follow an educational path free from arbitrary and

capricious retroactive change. The students' right to graduate under the catalog of entry and the universities' obligation to meet a changing world have been shown to co-exist quite admirably in virtually every university in the State of Alabama, including Auburn.

Yet the District Court ruled this "irrelevant". (R1-47-17, 18) As shown previously, not only can the District Court not weigh the evidence that a jury could readily use to find for the petitioner, neither can it legally make such a ludicrous and biased ruling that clear evidence defining the academic norm is "irrelevant". The District Court cannot both deny the clear proof of the academic norm while ruling against the petitioner that his due process rights were not violated.

The District Court apparently created its own academic norm out of thin air as the benchmark for due process determination and as long as the respondents gave some notice of an action, that action had to be permissible and let the academic norm be damned. Of course, the District Court's attitude is also that a college or school on Auburn's campus is so autonomous an academic entity that it can do, supposedly, anything it wishes, again without any regard to the academic norm or actions of a respondent Board of Trustees.

Unequal Protection

The key question for this Court is how to define and construe "similarly situated" with regard to equal

protection in an academic setting. (District Court at R1-47-18 citing Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). The petitioner contends that for such a fundamental and accepted academic principle as catalog-of-entry graduation similarly situated students should be defined as students in the Auburn University system governed by the same respondent Board of Trustees. All of these students are equally at the mercy of the respondent Board of Trustees and for one small group to be intentionally denied the right is classic unequal protection. Misery may love company but the company should not justify gross inequity of preventable Constitutional rights deprivation.

Ex Post Facto Violations

By making the graduation requirements retroactive the respondents are also in violation of Article I, Section 10 of the U.S. Constitution and controlling Alabama law as well. The respondents proclaim in their official capacities they are agents of the State of Alabama acting on behalf of Auburn University, a legal creation of the legislature. In this capacity their proclamations, publications and rules are state law. Paul v. U.S. Cal., 83 S.Ct. 426, 371 U.S. 245, 9 L.Ed.2d 292 and many others including Barber Pure Milk Co. of Montgomery v. Alabama State Milk Control Board, 156 So.2d 351, 275 Ala. 489--Huddleston v. Humble Oil and Refining Co., 71 So.2d. 39.

> ...Alabama law has recognized the right of a [petitioner] to test a rule or regulation of an administrative board which carries with it the power of law or authority for enforcement. Underwood v. State, 439 So.2d 1125 at 128.

Ex post facto laws are not limited to criminal actions or contracts between individuals. "It is settled law that Section 22, Article 1 of the [Alabama] Constitution of 1901 does not simply inhibit the state from impairing the obligations of contracts between individuals, but applies with like force and effect to contracts made by the state or with one of its agencies when authorized by law." Smith v. City of Dothan, 188 So.2d 532 at 534. (deletions in original)

The retroactive graduation requirements imposed by the respondents are clearly violations of the ex post

facto clauses of both the U.S. Constitution and by diversity jurisdiction and under the color of state law of the Alabama Constitution. Retroactive imposition of laws should be equally abhorrent on campus as well as off.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari in a case without precedent should be granted.

Respectfully submitted,

Ben Hammond
Petitioner, pro se
Box 486
Arab, AL 35016

December 22, 1988

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BEN HAMMOND. . . . . .PETITIONER,

vs.

AUBURN UNIVERSITY,
et. al . . . . . .RESPONDENTS.

APPENDIX TO THE PETITION

FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7638

BEN HAMMOND

VERSUS

AUBURN UNIVERSITY; JAMES E. MARTIN; GEORGE H. EMERT; DR. WARREN W. BRANDT; DR. DAVID IRWIN; R. LYNN WEAVER; R. C. BAMBURG; R. EMORY CUNNINGHAM; JOHN DENSON; R. BESSIE MAE HOLLOWAY; ROBERT E. LOWDER; MICHAEL McMCCARTNEY; BILL NICHOLS; MORRIS SAVAGE; HENRY B. STEAGALL, II; and JAMES TATUM, JR.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 25, 1988, 11 Cir., 198, ___F.2d. ___).

(September 30, 1988)

Before: JOHNSON, ANDERSON AND COX, Circuit Judges

PER CURIAM;

(X) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

[other non affirmed options ommitted by petitioner]

ENTERED FOR THE COURT;

[signature presumably of Anderson]
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-7638

Non-Argument Calendar

D.C. Docket No. 86-996

BEN HAMMOND

Plaintiff-Appellant,

versus

AUBURN UNIVERSITY;
JAMES E. MARTIN;
GEORGE H. EMERT;
DR. WARREN W. BRANDT;
DR. DAVID IRWIN;
DR. LYNN WEAVER;
R. C. BAMBURG;
DR. EMORY CUNNINGHAM;
JOHN DENSON;
DR. BESSIE MAE HOLLOWAY;
ROBERT E. LOWDER;
MICHAEL McCARTNEY;
BILL NICHOLS;

MORRIS SAVAGE;
HENRY B. STEAGALL, II; and
JAMES TATUM, JR.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Middle District of Alabama

(August 25, 1988)

Before JOHNSON, ANDERSON, AND COX,
Circuit Judges.

PER CURIAM;

AFFIRMED. See Circuit Rule 36-1.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

BEN HAMMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	86-D-0996-E
AUBURN UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is the

ORDER, JUDGMENT and DECREE of the Court:

1. That the defendants' motions for summary judgment be and they are hereby GRANTED in all respects;

2. That the complaint as amended in this cause be and it is hereby DISMISSED with prejudice; and

3. That costs be taxed against the plaintiff for which execution may issue.

DONE this the 24th day of September, 1987.

JOEL F. DUBINA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

BEN HAMMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	86-D-0996-E
AUBURN UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause is now before the Court on a motion for summary judgment filed herein by defendants Bamberg, Cunningham, Denson, Holloway, Lowder, McCartney, Nichols, Savage, Stegall and Tatum (Auburn University Board of Trustees) on June 22, 1987, and by defendants Martin, Emert, Brandt, Weaver and Irwin (Auburn University officials, administrators, and professors) on August 10, 1987. Pursuant to said motions, the defendants seek an order

from this Court granting summary judgment in their favor and against the plaintiff for damages in Counts One, Two and Three and for prospective injunctive relief.[1]

In support of said motions, the defendants rely upon all pleadings of record, affidavits of the defendants, depositions of the defendants and attached exhibits, and the deposition of the plaintiff and the affidavit of James E. Blackburn, Dean of the College of Education at Auburn University.

On July 6, 1987, the plaintiff filed a response in opposition to the defendants' motion for summary judgement. The plaintiff subsequently

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1 Count Four of the Complaint alleging conspiracy was dismissed for failure to state a claim upon which relief could be granted on April 7, 1987, by this Court.

supplemented that response by filing a memorandum brief with exhibits and his own affidavit on September 1, 1987. Pursuant to said response, plaintiff relies on all pleadings of record, Exhibits A and B, a memorandum brief, and Exhibit 1, and various portions of the depositions of defendants Martin, Brandt, Irwin and Flynn, and Dean Blackburn of the College of Education at Auburn University. The Court heard oral arguments on September 4, 1987, on the defendants' motions for summary judgement.

During oral arguments, the plaintiff conceded that there were no material facts in dispute and that this Court could dispose of the issues in this cause as a matter of law.

The plaintiff brings this action pursuant to the provisions of 42 U.S.C. Section 1983.

I. FACTUAL BACKGROUND

The plaintiff enrolled as a student at Auburn University Main Campus (hereinafter "Auburn") in the summer of 1982 in the College of Engineering. Prior to his enrollment at Auburn, the plaintiff had taken a Bachelor of Arts degree in history from Birmingham Southern College in 1971. (p. 10, plaintiff's deposition.) In 1972, the plaintiff received a secondary teaching certificate. The plaintiff also attended Auburn University at Montgomery from the spring of 1980 until the summer of 1982. (pp. 14 and 15 of plaintiff's deposition.) Upon entering Auburn in 1982, the plaintiff was classified as a

senior with 87 hours of course work in electrical engineering to complete before becoming eligible to graduate with a degree from the College of Engineering at Auburn. (Irwin deposition, p. 32.) Although the plaintiff needed only 87 hours to earn his degree, he attempted 195 hours over the course of the next several years in an effort to maintain a grade point average sufficient to keep himself enrolled at Auburn. (Irwin deposition, p. 33, defendants' Exhibit A.) The plaintiff sustained great difficulty with the electrical engineering curriculum as is evidenced by the large amount of tutoring he received. (Defendants' Exhibit B.) Despite these efforts on the part of the plaintiff, he was placed on both academic probation in

the summer quarter of 1983 and on academic suspension in the fall quarter of 1983. The plaintiff continued on academic probation through the summer and fall quarters of 1984. (Plaintiff's deposition, p. 21 and defendants' Exhibit A.) The plaintiff admitted that he was aware of his grade situation and the courses he was failing. (Plaintiff's deposition, pp. 53 and 65.) In twenty of the twenty-six electrical engineering classes taken by the plaintiff, he received either a D or an F mark as an evaluation of his work. In September of 1985, when the faculty of the College of Engineering informed the plaintiff that as a result of his unsatisfactory performance he would not be allowed to register for additional electrical engineering courses, the

plaintiff had achieved a 0.94 grade point average on a 4.0 scale in electrical engineering courses. (Defendants' Exhibit D.)

When the plaintiff entered Auburn as a student in 1982, the requirements for graduation with a degree in electrical engineering stated in the 1981-82 Auburn University Bulletin (hereinafter "82 Bulletin") were as follows:

> DEGREE REQUIREMENTS
>
> To earn a bachelor's degree from School of Engineering, a student must complete in his curriculum and must have a cumulative average of at least 2.00 on all work attempted at Auburn University. (Page 143).

The "82 Bulletin" also contained the following caveat on the first page which reads as follows:

> The University reserves the right to make changes as required in course offerings, curricula,

> academic policies and other rules and regulations affecting students, to be effective whenever determined by the University. These changes will govern current and formerly enrolled students. Enrollment of all students is subject to these conditions.

In June of 1984, the College of Engineering published a notice to all engineering students regarding a change in the graduation requirements. (See Defendants' Exhibit E "NEW ENGINEERING GRADUATION REQUIREMENTS.") These new requirements required engineering students to maintain a 2.00 grade point average on all work attempted in the student's particular major together with the original requirement that a 2.00 cumulative grade point average on all courses attempted at Auburn be maintained. The change in the graduation requirements did not include additional course work or credit hours

to be earned. The new graduation requirements were not to become effective, however, until one year later in the summer quarter of 1985. These changes in graduation requirements were widely circulated, and it is without dispute that the plaintiff was aware of the new requirements and that they would apply to him.[2] It appears that the plaintiff was at all times during his course of study at Auburn aware of his precarious academic position and that he would be subject to the new graduation requirements if he did not

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2 Not only were notices of the changes in graduation requirements widely circulated, but copies of the notices were distributed to the undergraduate counsellors who, in turn, advised the students concerning the changes in graduation requirements and the effective data of those changes. (Irwin deposition, p. 22.)

graduate by the summer quarter of 1985. (Plaintiff's deposition, pp. 53 and 64.) It is undisputed that by the summer quarter of 1984, when the new requirements were announced, that the plaintiff required only 33 hours of electrical engineering courses to become eligible for graduation. This situation would have required the plaintiff to pass on average only 8 or 9 hours in electrical engineering courses per quarter and still graduate within the year's grace period before the new requirements went into effect. The plaintiff's failure to complete his course of study by the summer quarter of 1985 brought his academic deficiencies to the attention of Dr. Nick Conrad. (Irwin deposition, p. 10 & 11.) Dr. Conrad brought the plaintiff's academic

situation to the attention of Professor David Irwin, head of the Electrical Engineering Department, because the plaintiff's 0.94 grade average was far below the 2.00 grade point average in the major course of study now required for him to graduate. Professor Irwin contacted four electrical engineering professors, several of whom were familiar with the plaintiff and his academic performance. (Irwin deposition, p. 19 & 20.) These professors reviewed the plaintiff's marks and academic record and recommended to Professor Irwin that the plaintiff be suspended from the College of Engineering. (Defendants' Exhibit F.) After receiving this recommendation, Professor Irwin contacted the Dean's Office for the

College of Engineering and Dr. Conrad concerning the plaintiff's academic record. As a result of several discussions Professor Irwin had with other Auburn officials, and after reviewing the recommendation of the faculty members, Professor Irwin informed the plaintiff, on or about September 5, 1985, that the faculty had reviewed his work and found that it was unsatisfactory. Professor Irwin further informed the plaintiff that due to his unsatisfactory progress towards a degree in electrical engineering he would no longer be permitted to register for electrical engineering classes. (Defendants' Exhibit D.) Professor Irwin and his fellow faculty members' decision was made in reliance on the discretion afforded them under a

procedure outlined in the Auburn University Bulletin which reads in pertinent part as follows:

> Auburn University may place an undergraduate student on probation or suspension at any time if the student flagrantly neglects academic work or makes unsatisfactory progress towards graduation.

However, Professor Irwin exercised his discretion in such a manner that the plaintiff was suspended from taking any additional electrical engineering courses, but he was permitted to pursue any other curricula offered at Auburn.[3] On or about October 18, 1985, the plaintiff filed a formal written appeal to the Auburn Student Academic Grievance Committee. The Committee subsequently

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3 It is undisputed that the plaintiff was not dismissed as a student from Auburn University and could have pursued any other course of study.

heard the plaintiff's case but agreed with the recommendation made by the Electrical Engineering faculty and Professor Irwin. The plaintiff then appealed to Dr. Brandt, Dr. Emert and President Martin, each of whom reviewed the plaintiff's marks and academic performance and concurred in the recommendation of the Student Academic Grievance Committee.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This Court has already dismissed the plaintiff's claims for damages against the defendants in their official capacities as being barred by the Eleventh Amendment. However, the Court granted leave to the plaintiff to amend his complaint so that the defendants could be added as parties in their

individual capacities. (See this Court's Opinion filed January 28, 1987.) This Court now finds that the plaintiff has offered no evidence, by way of either affidavit or deposition, that any of the named defendants herein have committed any acts toward the plaintiff in their individual capacities which violated his rights to substantive due process, equal protection of the laws or breached any contractual rights that he had with Auburn. The only evidence before this Court concerns the conduct of the defendants in their official capacities as trustees of Auburn University and as officials and professors of Auburn University. Accordingly, this Court is of the opinion that the defendants' motions for summary judgment are due to be granted

to the extent said defendants are sued in their individual capacities. See, Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

This leaves for the Court's review, the plaintiff's prayer for prospective injunctive relief based upon the plaintiff's substantive due process, equal protection and contractual claims.

Rule 56(c), Fed. R. Civ. P., provides that a summary judgment may be granted only:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Accordingly, when considering a motion for summary judgment, the Court must refrain from deciding any material

factual issues. Instead, the Court's sole function on a motion for summary judgment is to determine whether there exist issues of material fact to be tried and, if not, whether the moving party is entitled to a judgment as a matter of law. See Dominick v. Dixie Nat. Life Ins. Co. 809 F.2d 1559 (11th Cir. 1987); Tippens v. Celotex Corp., 805 F.2d 949 (11th Cir. 1986); and Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir. 1980). Moreover, in performing this function, inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary judgment. In other words, all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. See United

States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Tippens v. Celotex Corp., supra; and Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352 (11th Cir. 1986).

As to the burden of proof on a motion for summary judgment, it is clear that the movant bears the exacting burden of showing both that there is no actual dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Combs v. King, 764 F.2d 818 (11th Cir. 1985). In clarifying the proper allocation of this burden, the United States Supreme Court has stated that:

> [W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily

implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict--"whether there is [evidence] upon which a jury [could] properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Citations omitted.)

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Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden....The question is whether a jury could reasonably

> find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not.
>
> ***
>
> Our holding,...[however] does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. (Citations omitted.) Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. (Citations omitted.)

Anderson v. Liberty Lobby, Inc., 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 202, 214-16 (1986). See also Celotex Corp. v. Catrett, 477 U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Having applied the above rules and principles of law to the instant motions for summary judgment and having considered all evidence offered in support of and in opposition to the same, this Court is of the opinion that no genuine issues of material fact exist herein and the defendants are entitled to a judgment as a matter of law on all counts remaining in the complaint and for the prospective injunctive relief prayed for by the plaintiff.

III. DISCUSSION

The plaintiff claims that the defendants who comprise the Auburn University Board of Trustees have violated his constitutional rights by approving as the Board of Trustees the use of the 1985-1986 Auburn University Bulletin. The plaintiff admits that he

did not present his case to the trustees. The plaintiff further admits that he knew of no intentional activity on the part of the trustees to prevent him from graduating. (Plaintiff's deposition, pp. 39, 40, 41 and 89.) This Court cannot find any evidence that the Auburn Board of Trustees took any action other than adopting the use of the 1985-86 Bulletin which incorporated the changes in the requirements for graduation for the College of Engineering. Absent a showing of some facts by the plaintiff demonstrating some action on the part of the individual members of the Board of Trustees, this Court is obliged to grant summary judgement for the Defendant trustees because the plaintiff's complaint against them is without a

factual basis. It is this Court's opinion that the act of approving the 1985-1986 Bulletin by the defendant trustees does not state a cause of action under Section 1983. Not only does it fail to establish any personal activity on the part of the defendants specifically toward the plaintiff, but the adoption of the Bulletin and the neutral change of academic policy contained therein is simply not a constitutional violation. The United States Supreme Court has held that federal courts are unsuited to review academic decisions. Board of Curators University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). This Court finds specifically that the action taken by the Board of Trustees in adopting the 1985-86

Bulletin which contained the change of graduation requirements was a reasonable exercise of its educational responsibilities. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).

1. Standard of Review.

Before this Court begins its discussion of the remaining issues in this case, it must decide by what standard it will evaluate the plaintiff's claims. It is obvious, no evidence having been submitted to the contrary, that the actions taken by the defendants toward the plaintiff were not disciplinary in nature. The plaintiff argues that the decision made by the defendants was one of policy implementation and, therefore, not an academic decision. The purport of this argument on the part of the plaintiff is

to enlarge the standard of review to be employed by this Court in reviewing the plaintiff's claims. This Court is of the opinion that the plaintiff's argument is, at best, a distinction without a difference. The policy implemented by the Auburn University Board of Trustees was academic in nature and the decision by the officials at Auburn concerning the plaintiff was also academic in nature. The federal courts have adopted a very limited role in the review of challenges to academic decisions. The United States Supreme Court held in Horowitz, supra, at 89-90:

> If a "Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," Bishop v. Wood, 426 U.S. at 349, 48 L.Ed.2d 684, 96 S.Ct. 2074, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational

> institutions--decisions that require "an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision making."

This language supports the Court's theory in Horowitz, supra, that the wisest possible range of discretion must be afforded university faculties in their evaluation of a student's academic performance and eligibility to promotion or graduation. Clearly, this Court can only review an academic decision in light of whether or not the "person or committee responsible did not actually exercise professional judgment." Regents of the University of Michigan v. Ewing, 474 U.S. ___, 88 L.Ed.2d 523, 106 S.Ct. 507 (1985).

2. Substantive Due Process.

The narrow standard of review defined in Ewing has been adopted in

reviewing substantive due process claims by the United States Court of Appeals for the Eleventh Circuit. In Haberle v. University of Alabama at Birmingham, 803 F.2d 1536 (11th Cir. 1986), the Court held:

> Ewing makes it plain, in absence of an improper motive, an academic dismissal must be "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment" before it will be overturned on substantive due process grounds." Haberle, supra, at 513.

The United States Court of Appeals for the Eighth Circuit has likewise adopted a narrow standard not unlike the Eleventh Circuit in Haberle, supra. In Schuler v. University of Minnesota, 788 F.2d 510 (8th Cir. 1986), the Eighth Circuit adopted an arbitrary and capricious standard requiring a student to show a lack of a rational basis in an

academic dismissal or that the University was motivated by bad faith or malice "unrelated to academic performance." Schuler, supra, at 515.

In reviewing the plaintiff's substantive due process claim, this Court must express the same doubts as Justice Powell in Ewing, supra, as to whether or not the plaintiff can even demonstrate a constitutionally protected property or liberty interest in continuing his post-secondary education. But following the United States Supreme Court's lead as well as that of the Eleventh Circuit Court of Appeals, this Court assumes, arguendo, for purposes of this opinion, that a constitutional right is implicated. In light of the standards adopted by this circuit and by the United States Supreme Court in

Ewing, supra, this Court cannot reach the conclusion that the plaintiff was treated in a manner which was completely devoid of reasoned academic decision-making. Rather, this Court, after considering the undisputed evidence before it, must conclude that the defendants gave the plaintiff notice of the change in graduation requirements and a reasonable and generous amount of time in which to become eligible for a degree under thee old requirements. Upon the plaintiff's failure to complete the remaining 33 hours of the electrical engineering courses within the year's grace period, the College of Engineering elected to close the electrical engineering curriculum to the plaintiff because he was making unsatisfactory progress towards his degree. However,

the plaintiff was not dismissed as a student from Auburn University, but rather, only one avenue was closed to him based solely on his academic record. This Court is of the opinion that the plaintiff was treated in a fair and reasonable manner. The plaintiff has not offered any basis for this Court to doubt the motives of the defendants and substantial evidence has been offered that the defendants treated the plaintiff according to a set policy in light of his academic performance. Having taken the aforementioned into consideration, this Court is of the opinion that the plaintiff's substantive due process claim is without merit.

3. The Contract Theory.

The plaintiff puts forth another argument advancing a theory that he had

a contract with Auburn University based upon the '82 Bulletin and that the change in the degree requirements as they applied to him amounted to a breach of contract.

Without finding specifically that the plaintiff had a binding contract with Auburn, this Court will assume, arguendo, that some sort of educational contract existed. In discussing the plaintiff's breach of contract claim, it should be noted that the '82 Bulletin contained the following caveat:

> The University reserves the right to make changes as required in course offerings, curricula, academic policies and other rules and regulations affecting students, to be effective whenever determined by the University. These changes will govern current and formerly enrolled students. Enrollment of all students is subject to these conditions.

The law in this circuit is clear regarding breach of contract claims similar to the plaintiff's herein. Implicit in a student's educational contract with the University is the duty of the student to comply with the University's rules and regulations which the University can modify "so as to properly exercise its educational responsibilities." Mahavongsanan, supra, at 450. The facts in Mahavongsanan, supra, are instructive for the purposes of this discussion because they closely resemble the facts of the instant case. There the plaintiff was a student who brought suit against Georgia State University in an attempt to compel it to award her a degree. The plaintiff alleged that Georgia State University breached its

contract with her by requiring her to take a comprehensive examination to graduate, which was not a requirement when she enrolled. The plaintiff received ample notice of the change in the requirements to graduate, and the Fifth Circuit Court of Appeals found the change to be a proper exercise of the University's educational responsibilities. A similar result was reached concerning the changing of degree requirements in Easley v. University of Michigan Board of Regents, 627 F.Supp. 580 (E.D. Mich. 1986). In Easley, the University of Michigan Law School changed the number of hours to graduate after the plaintiff enrolled. The plaintiff claimed in his suit that he was not bound by the change in hours to graduate, but the district court

rejected his argument. The Court in Easley found that the University had an inherent right to modify degree requirements and that the bulletin relied upon by the plaintiff contained language specifically stating the information in the bulletin was subject to change.

In the instant case, the record demonstrates that Auburn University specifically reserved the right to modify its graduation requirements and gave the plaintiff notice of the changes when they were made. In addition, Auburn allowed all students in the same situation as the plaintiff one year in which to graduate under the terms of the '82 Bulletin. Accordingly, it is the opinion of this Court that the

plaintiff's breach of contract claim is completely without merit.

4. Equal Protection Claim.

The plaintiff makes a claim that the defendants violated his right to equal protection of the laws. The plaintiff's theory is based upon his assertion that other state universities in Alabama have degree requirements which would have permitted him to take a degree in electrical engineering. In support of his argument, the plaintiff has offered the Court the general degree requirements of other state universities in Alabama and his affidavit stating the degree requirements are different among several of the universities. This Court is of the opinion that this evidence is irrelevant. It appears that other students in the plaintiff's academic

situation at Auburn either overcame their disabilities within the one year grace period and became eligible for their degree or opted to pursue some other course of study. (Flynn's deposition, p. 41, Defendants' Exhibit "D".) The plaintiff has offered no other evidence of students within the College of Engineering who, in the same or similar position, were treated any differently from the plaintiff. In fact, the Court finds to the extent there is any evidence concerning the treatment of other students, such evidence is squarely against the plaintiff. The plaintiff argues that the College of Education at Auburn may change its requirements but will now allow this change to affect already

enrolled students in that college. Whether this change is contemplated or presently in effect is not clearly established, but it appears to be equally irrelevant. The Dean of the College of Education testified at his deposition that each college at Auburn was free to make its own proposals for degree requirements to the University (p. 19 Blackburn deposition).

The Equal Protection Clause of the Fourteenth Amendment does not require all persons to be treated either identically or equally. See, Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). To the extent that any equal protection analysis is required here, absent the plaintiff's establishing a clearly

protected liberty or property interest by the Constitution in his post-secondary education, this Court would look to see if persons similarly situated to the plaintiff have been treated differently. As has been discussed previously herein, there is no evidence that any electrical engineering students in the same position as the plaintiff have been treated differently from the plaintiff. The facts before the Court clearly demonstrate that those students who were in the plaintiff's position within the College of Engineering either graduated before the effective date of the new requirements or chose a new discipline. See, Watson v. Univ. of So. Ala. College of Medicine, 463 F.Supp. 720 (S.D. Ala. 1979). The plaintiff has offered the

Court nothing on which to base his equal protection claim. Accordingly, it is the opinion of this Court that the plaintiff's equal protection claim is without merit.

5. Miscellaneous Issue.

Finally, the plaintiff argues that he should be given credit for electrical engineering courses taken by him at Tuskegee University and Auburn University at Montgomery after he was forbidden to register for electrical engineering courses at Auburn. This argument is without merit. The plaintiff knows or ought to know that the '82 Bulletin and the 1985-86 Bulletin require that the plaintiff's final 45 hours for his degree be earned in residence at Auburn. The plaintiff has offered no evidence that this

requirement was waived by the Dean of the College of Engineering. In fact, the facts before the Court clearly demonstrate that no such waiver has ever been offered the plaintiff. (Plaintiff's deposition, p. 85.)

In conclusion, it is the opinion of this Court that the defendants' motions for summary judgment are due to be granted in all respects and that the complaint as amended in this cause is due to be dismissed with prejudice.

A separate order will accompany this Memorandum Opinion.

DONE this the 24th day of September, 1987.

JOEL F. DUBINA
UNITED STATES
DISTRICT JUDGE